BANK BUMIPUTRA MALAYSIA BERHAD

v.

AUSTRALIA FURNITURE (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING JC
[ORIGINATING SUMMONS NO. D5-24-175-94]
28 JANUARY 1995

DECLARATORY RELIEF: *Injunction - Grant of - Alternative remedy - Whether injunction could be granted when an equally efficacious relief was obtainable elsewhere - Damages - Damages ascertained - Whether an adequate remedy - Inordinate delay - Whether fatal - Specific Relief Act 1950 ss. 52(3), 54 - Distress Act 1949 s. 10(1)(c).*

The applicant granted credit facilities totalling RM700,000 to one Australia Furniture Manufacturer Sdn. Bhd. (the company). In consideration the company executed some debentures, and by that had put all its assets and undertakings (the said assets) to both fixed and floating charges. Sometime later the respondent executed a writ of distress at the premises of the company and the said assets were thereby seized. Following that two auctions in respect of the assets were carried out by the respondent but both were aborted for lack of bidders. The applicant was aware of these auctions, but for reasons unknown, decided to do nothing. However, a day before the third auction was scheduled to take place, the applicant served on the respondent the present application seeking, *inter alia*, to injunct the respondent from executing the writ of distress. The applicant contended that the respondent's seizure and intended auction had unlawfully infringed its rights and interests over the said assets.

Before the learned Judge the respondent argued that declaratory relief ought not to be granted as other suitable remedies were available to the applicant. According to the respondent, under s. 10(1) of the Distress Act 1951, the applicant could have applied for the warrant of distress to be discharged or suspended, or for the distrained articles to be released. The applicant, according to the respondent further, was also guilty of inordinate delay which, in the circumstances, was fatal.

Held:

[1] It is clear that the applicant should first seek relief in the Kuala Lumpur Sessions Court which issued the said writ of distress, by applying for a suitable remedy under s. 10(1)(c) of the Distress Act 1949, before applying to this Court for declaratory relief. As in the case of declaratory relief, injunction is an inappropriate remedy where an equally efficacious relief can be obtained elsewhere.

[2] In the instant case, there was delay on the part of the applicant in applying for the injunction. This inordinate delay demonstrated the applicant's lack of seriousness in pursuing this matter. The facts showed very clearly that the applicant had been sleeping on their rights for almost two months, and this should disentitle them from obtaining discretionary relief.

[3] On the facts the applicant had not only failed to show that it would suffer irreparable damage in the event an injunction is not granted, but had further calculated and ascertained the exact amount owed by the company. The facts thus demonstrate that this is not a case

falling within the paragraphs of s. 52(3) of the Specific Relief Act 1950. The equitable relief sought in this application is inappropriate and the circumstances do not warrant the grant of such relief.

[Application dismissed with costs].

Cases referred to:

Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn. Bhd. [1990] 1 CLJ, 805 ***(foll)***
Collings Hui Sdn. Bhd. v. United Estate Projects Bhd. & Anor. [1988] 3 MLJ 234 ***(refd)***
Evercrisp Snack Products (M) Sdn. Bhd. & Anor. v. Sweeties Food Industries Sdn. Bhd. ***(foll)***
Metal Industry Employees nion v Registrar of Trade Union & Ors [1976] 1 MLJ 80 ***(foll)***
Kuluwante (An Infant) v Government of Malaysia [1978] MLJ 92 ***(foll)***
Bates v Lord Hailsham of St. Marylebourne [1972] 1 WLR 1373 ***(foll)***
Haji Wan Habib Syed Mahmood v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 ***(refd)***

Legislation referred to:

Specific Relief Act 1950 s. 52(3)
Distress Act 1949 s. 10(1)(c).

For the applicant - M/s. Tunku Mukhrizah & Partners
For the respondent - M/s. Chai & Partners

JUDGMENT

Low Hop Bing JC:

I. Application

The applicant, *vide* encl. 2, seeks the following orders:

(1) a declaration that the floating charges created in favour of the applicant by the debentures dated 9 October 1991 and 23 September 1992, (hereinafter referred to as "the said debentures") had crystallized before the execution of the writ of distress *vide* Kuala Lumpur Sessions Court originating application (distress) No. 54-2-94 (hereinafter referred to as "the said writ of distress") by the respondent was completed;

(2) a declaration that by virtue of the said debentures, the applicant at all material times holds fixed charges over the assets (as described in para. 4 of the affidavit in support of Hj Ahmad Kushairi Bin Mat dated 5 July 1994) of Australia Furniture Manufacturer Sdn. Bhd. and takes priority over the respondent;

(3) an order that the respondent whether by itself, its servants or agents or otherwise be restrained and an injunction be granted restraining it, until disposal of this action or further order, from taking any further step in the execution of the said writ of distress;

(4) an order that damages to be assessed.

(5) an order that costs of this action be borne by the respondent.

II. Facts and Circumstances

In consideration of the applicant granting credit facilities totalling RM700,000 to one Australia Furniture Manufacturer Sdn. Bhd. (hereinafter referred to as "the said company") the said company executed the said debentures, creating therein both fixed and floating charges over all of the said company's assets and undertakings (hereinafter jointly referred to as "the said company's assets").

On 28 January 1994, pursuant to leave granted by the KL Sessions Court *vide* originating application (distress) No. 54-2-94 (hereinafter referred to as "the said distress application"), the said writ of distress was executed by the respondent at the premises of the said company. The said company's assets, which are subject to the said debentures, were seized thereby. The seized goods were scheduled for auction on 26 May 1994, but later aborted as there was no bidder. A second auction was fixed on 8 July 1994 which was yet again aborted due to the same reason.

It is against this seizure of goods and its intended disposal by another (3rd) public auction that the applicant seeks the above orders against the respondent as the applicants alleged that their rights and interests over their (applicant's) goods are being infringed by the respondent's seizure and intended auction. For brevity, unless otherwise stated, a reference to a section is a reference to that section under the Distress Act 1949 (hereinafter referred to as "the Act").

III. Preliminary Objection

1. By the respondent

The respondent contends that an order for declaration should not be given if there are other suitable remedies available to the applicant eg., under s. 10(1) i.e. by applying for the warrant of distress to be discharged or suspended or to release the distrained articles.

2. Applicant's Reply

The applicant contends that the sole issue to be decided by the Court is the question of priority over the distrained 'assets' and so the applicant herein falls outside the ambit of the Act which, according to the applicant, does not lay down the test to determine priorities.

3. Decision of the Court

For the purpose of deciding on this issue, it is pertinent to refer to the relevant portion of s. 10(1)(c) which reads as follows:

> 10(1) Where any movable property of - ... (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, has been seized under a warrant of distress to recover arrears of rent due to a superior landlord by his immediate tenant, such ... other person aforesaid may apply to a Judge to discharge or suspend the warrant, or to release a distrained article:

Upon a careful reading of s. 10(1)(c), I am of the considered view that there are merits in the respondent's preliminary objection. In *Metal Industry Employees Union v. Registrar of Trade Union and Ors.* [1976] 1 MLJ 80, it was held that the Court should not be invited to make the declaration sought since an alternative remedy was clearly prescribed by the law by way of appeal to the Minister under s. 17 of the Trade Unions Ordinance, 1959.

This decision was upheld by the Federal Court sub. nom. *Metal Industry Employees Union v. Registrar of Trade Union & Ors.* [1976] 1 MLJ 220, and followed in *Kuluwante (An Infant) v. Government of Malaysia & Anor.* [1978] MLJ 92. In my judgment it is clear to me that the applicant should first seek relief in the Kuala Lumpur Sessions Court which issued the said writ of distress, by applying under s. 10(1)(c), which clearly prescribes by law a suitable remedy available to applicant, before applying to this Court for declaratory relief. On this ground alone, I dismiss the application *in limine.*

However, should I err in law in the above interpretation and assuming that the applicant is right in pursuing this application without having to avail itself of the remedy under s. 10(1)(c) above, I now proceed to consider the application on its merits.

IV. Merits of the Application

The applicant's submission in its entirety is grounded upon the issue of priority between a landlord distraining for rent and debenture holders.

The respondent on the other hand submits that in light of the equitable relief sought by the applicant *viz* declaration and injunction, the issue is not one of priority or rights and interest, but rather the questions:

(i) whether such equitable relief is the appropriate remedy? and

(ii) whether the circumstances of this case warrant the ordering of such equitable relief?

(1) Declaration

The question relating to declaration has been dealt with and answered above.

(2) Injunction

(a) Injunction is an inappropriate remedy

In my judgment, I hold that as in the case of declaratory relief above, injunction is an inappropriate remedy because an equally efficacious relief can certainly be obtained under s. 10(1)(c). Section 54 of the Specific Relief Act 1950 provides as follows:

An injunction cannot be granted:

(1) when an equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust".

See also *Haw Par Brothers International Ltd. v. Overseas Textiles Co. Ltd.* [1978] 2 MLJ 9.

In *Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn. Bhd.* [1990] 1 CLJ, 805 Park East Holdings (M) Sdn. Bhd. together with one Sya Lieng Siew, who purported to sue for and on behalf of Kelab Damansara Westpoint ("the Westpoint Club") and two others, applied on 30 June 1989 by way of summons-in-chambers for, *inter alia*, an injunction to restrain the plaintiff from taking any further step in the execution of the writ of distress on the ground that among the goods that were distrained were goods allegedly owned by them. The application came up for hearing on 3 July 1989 and by consent the auction of the distrained goods was stayed upon the payment of a sum of RM10,000 by the applicants into Court as security for any damages that might be sustained by the plaintiff as a result of the stay. The applicants were also given leave to apply under s. 10(1) for the release of the goods claimed by the applicants.

On 4 July 1989, an application under s. 10(1) was accordingly made by Park East Holdings (M) Sdn. Bhd. (In Receivership). In the meantime seven more claimants also applied for the release of the goods mentioned in their respective applications which they claimed were owned by them.

In that case, even though an injunction was applied on 30 June 1989, an application under s. 10(1) was made 4 days later on 4 July 1989, a day immediately after leave was obtained on 3 July 1989. It was held that the appropriate remedy is that provided in s. 10(1) and an application for this remedy should have been made immediately. The equitable remedy of injunction is obviously not an appropriate remedy.

(b) Delay

In the instant case, there was delay on the part of the applicant in applying for the injunction. The first auction date was fixed pursuant to the said writ of distress on 26 May 1994. The applicant was aware of the first auction date as early as 20 May 1994, if not earlier, *vide* letter dated 20 May 1994. (See exhibit "A1" of the affidavit in reply of Ng Ah Kow affirmed on 20 July 1994). As only certain pages of the said debentures were enclosed with this letter dated 20 May 1994 the respondent, through their solicitors, requested for further information. However, the applicant, through their solicitors, *vide* letter dated 28 May 1994 refused to provide further information. The respondent, through their solicitors, *vide* letter dated 31 May 1994 again requested for the further information.

The applicant's solicitors replied *vide* letter dated 10 June 1994 stating that:

1) the floating charges were converted into fixed charges;

2) the bank facility was recalled;

3) crystallizations had occurred;

all of which took effect one day before the said letter i.e. on 9 June 1994. Only then were the said debentures released to the respondent's solicitors.

Vide the said letter dated 10 June 1994, the applicant's solicitors indicated that they were aware of a 2nd auction fixed for 16 June 1994.

No earlier application was made by the applicant. The application herein was only served on the respondent's solicitors on 7 July 1994, a day before the 3rd auction which had been fixed for 8 July 1994 and almost 2 months after the applicant was first aware of the said writ of distress.

This inordinate delay, in my view, demonstrates the applicant's lack of seriousness in pursuing this matter. All the material circumstances relating to the delay were never revealed in the affidavit in support of the application herein.

Delay is particularly likely to be fatal when the plaintiff has waited until the eleventh hour before taking action. (See *Injunction* by David Bean, Criteria: Perpetual Injunction at p. 18).

In *Bates v. Lord Hailsham of St. Marylebourne* [1972] 1 WLR 1373, the applicant sought, at two hours' notice, to restrain the Lord Chancellor and others from making an order with regard to solicitors' remuneration; the tardiness of the application was not sufficiently explained. Megarry J observes at p. 1379 :

> Finally there is the point that I raised, that of timing. An application made at 2 p.m. for an injunction to restrain certain acts which may take place at 4.30 p.m. on the same day is an application made at a desperately late hour. Indeed, when the submissions of Counsel continue until 4.15, the application could scarcely run it finer. There are, of course, occasions when circumstances make an earlier application impossible. But here, the dates speak for themselves....

> For nearly three weeks the association has known that the committee was to meet today. On what Mr. Nicholls told me in answer to questions, it seems that is was not until 8 July, that the executive committee of the association sent a memorandum to the chairman, and then on 10 July, the chairman instructed the secretary to consult Counsel. On these facts Mr. Nicholls did his best; but the material was intractable. An injunction is a serious matter, and must be treated seriously. ... Accordingly, unless perhaps the plaintiff had had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiently explained delay alone."

In *Evecrisp Snack Products (M) Sdn. Bhd. dan Anor. v. Sweeties Food Industries Sdn. Bhd.* [1980] 2 MLJ 297 at p. 298 Hashim Yeop A Sani J, as he then was, after finding that there was unreasonable delay in applying for interim relief and that the delay has not been satisfactorily explained, dismissed the motion.

In *Haji Wan Habib Syed Mahmad v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor.* [1986] 2 MLJ 198 the Supreme Court held, *inter alia*, that "discretionary remedies are exceptional in their nature and should not be made available to those who sleep on their rights."

In this case, it is my specific finding that the applicant have been "sleeping" on their rights for almost 2 months, and this should disentitle the applicant from obtaining discretionary remedies.

(c) Damages would be an adequate remedy

In the instant case, damages would in my judgment be an adequate remedy. It is trite law that injunction will not be granted if damages would be an adequate remedy.

On the facts of the instant case, in addition to the said debentures, three directors of the said company have given their personal guarantees. The total outstanding sum as affirmed by the branch manager of the applicant at para. 10 of the affidavit in support of this application (encl. 1) is only RM134,434.84. As such, losses, if any, which could be suffered by the applicant would be this amount due by the said company to the applicant and which amount can be ascertained with exact precision. This ascertained amount also appears in the applicant's affidavit.

Section 52(3) of the Specific Relief Act 1950 provides for the situations in which a perpetual injunction may be granted, *inter alia*:

a) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

b) where the invasion is such that pecuniary compensation would not afford adequate relief;

c) where it is probable that pecuniary compensation cannot be got for the invasion.

The facts herein clearly demonstrate that this is not a case falling within the above paragraphs of s. 52(3) of the Specific Relief Act 1950 and as such an injunction should not be granted.

In *Collings Hui Sdn. Bhd. v. United Estate Projects Bhd. & Anor.* [1988] 3 MLJ 234, the questions on which the application (for injunction) turns is whether damages would not be an adequate remedy. V.C. George J held:

In my judgment, in the instant case, plaintiffs can be compensated in damages if any has been suffered or will be suffered and which, as has been seen, the plaintiffs themselves have estimated and which can in any event be easily assessed. That the plaintiffs have spent money on advertisement and extra staff and had put in effort and time into the project does not change the position. Accordingly there is no need for me to consider the question of balance of convenience.

In *Evercrisp Snack Products (M) Sdn. Bhd. & Anor. v. Sweeties Food Industries Sdn. Bhd. supra*, the second ground of objection was that there is apparently no evidence to show irreparable damage if the injunction was not granted. The learned Judge held that there was no evidence of irreparable damage and dismissed the motion.

The applicant in the instant case has not only failed to show that it would suffer irreparable damage in the event an injunction is not granted, but has further calculated and ascertained the exact amount which is owed by the company. Therefore, in my judgment, the equitable relief sought in this application is inappropriate and the circumstances of this case do not warrant the ordering of such equitable relief which is discretionary in nature. I therefore dismissed this application with costs.